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Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554



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| In the Matter of | ) | |
| | ) | |
| Policy and Rules Concerning the | ) | |
| Interstate Interexchange Marketplace | ) | CC Docket No. 96-61 |
| | ) | |
| Implementation of Section 254(g) | ) | |
| of the Communications Act of 1934, | ) | |
| as Amended | ) | |
| | ) | |
| To: the Commission | ) | |

**PETITION FOR RECONSIDERATION**
**OF NEXTEL COMMUNICATIONS, INC.**

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby petitions the Federal Communications Commission ("Commission") for reconsideration of the *Order* issued on December 31, 1998, in the above-referenced proceeding addressing integration of commercial mobile radio service ("CMRS") interexchange rates.[1/] As shown below, the Commission erroneously concluded that the language of Section 254(g) is unambiguous and *requires* application of the rate integration and averaging requirements to CMRS providers. Such a conclusion is not only erroneous and unnecessary, it will frustrate the Commission's successful deregulatory policy of favoring market-based competition to rate regulation. Further, there are substantial practical problems faced by many CMRS licensees, including Enhanced Specialized Mobile Radio

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1/ *See* Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Memorandum Opinion and Order*, CC Docket No. 96-61, FCC 98-347 (rel. Dec. 31, 1998) ("*Order*").

("ESMR") providers, to comply with the Commission's definition of "interstate interexchange" service.

## I. THE COMMISSION'S INTERPRETATION OF SECTION 254(g) FAILS AS A MATTER OF LAW AND IS CONTRARY TO COMMISSION PRECEDENT

### A. *The Language of Section 254(g) Is Ambiguous*

As the Commission properly recognized, statutory interpretation under the well-established *Chevron* analysis requires a threshold determination of whether the language of the provision under review is unambiguous.[2/] If the meaning is plain, that is the end of the analysis. If, however, the language is ambiguous and subject to differing interpretations, the interpreter must look to other sources, such as the legislative history to determine the provision's intended meaning.[3/]

In its latest *Order* interpreting Section 254(g), the Commission found the language relating to providers of interstate interexchange service to be unambiguous in its application to CMRS providers. According to the Commission, "the language of [S]ection 254(g) . . . on its face unambiguously applies to all providers of interstate, interexchange services. Thus, [S]ection 254(g) applies to the interstate, interexchange services offered by CMRS providers."[4/] This conclusion is unsupported and contrary to the Commission's prior interpretation of the very same provision.

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2/ *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

3/ *Id.*

4/ *Order* at ¶ 10 (emphasis added). According to the Commission, while CMRS providers may be characterized as providers of exchange and exchange access services, this description does not preclude a finding that some of a CMRS provider's service offerings are interstate, interexchange services.

Neither the "plain language" of Section 254(g), nor any other provision of the Telecommunications Act of 1996, provide any guidance as to what Congress meant by imposition of a rate averaging and rate integration obligation on a "provider[] of interstate, interexchange service." Certainly there is no indication that Congress intended to expand the Commission's pre-1996 rate integration policy to CMRS providers. Congress did not provide a definition of the term "provider of interstate interexchange services" that supports the Commission's conclusion or a definition different from the traditional meaning of the terms "interstate interexchange services."[5/]

Even more persuasive is the fact that the Commission previously found the very same language ambiguous in the context of extending the requirement to integrate the rates of affiliated companies. According to the Commission:

> The meaning of the phrase "a provider of interstate interexchange telecommunications services" in Section 254(g) is, in our view, ambiguous. That phrase is not specifically defined, nor does the statute give any explicit guidance on how to treat affiliated companies. Thus, we interpret this phrase in the way that best comports with our prior rate integration policy, and Congress' stated intent to codify that policy.[6/]

Essentially, the Commission has read the language of Section 254(g) as ambiguous in one instance to achieve its desired result, *i.e.*, that Section 254(g) requires rate integration across affiliates, and as

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[5/] *See, e.g.,* Dissenting Statement of Commissioner Michael K. Powell at 1 ("Powell Statement"). The Commission's conclusion that rate integration applies only to service provided between Major Trading Areas ("MTAs") or "inter-MTA" effectively concedes that the provision is ambiguous since the standard interpretation of the term "interexchange" would appear to mean "between exchanges." Indeed, as Commissioner Powell points out, MTAs can include multiple exchanges. *Id.*

[6/] Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *First Memorandum Opinion And Order On Reconsideration*, 12 FCC Rcd 11812, 11819 at ¶ 14 (1997) ("*First Memorandum Opinion and Order*").

unambiguous in another instance to achieve another desired outcome, *i.e.*, that Section 254(g) applies to CMRS services. These conflicting statutory interpretations must be reconciled.[7/]

Because the Commission failed to provide any reason for its starkly different conclusions regarding the same statutory language, and because the Commission found that the statutory language can be read two ways, Section 254(g) must be read as ambiguous with respect to what Congress meant by the phrase "provider[s] of interstate interexchange telecommunications service." Thus, the Commission's most recent conclusion that Section 254(g)'s provisions directly apply to CMRS, must be reconsidered.

B. *The Legislative History of Section 254(g) Demonstrates That Rate Integration Does Not Apply to CMRS Carriers*

As the Commission's *Order* acknowledges, once a statutory provision is found ambiguous, the Commission must look to the legislative history to discern Congress' intent.[8/] The Commission, however, in its review of the legislative history, misinterprets its contents.[9/]

Providing no legal basis for its conclusion, the *Order* asserts that there is "nothing in th[e] legislative history that unambiguously indicates that CMRS providers are exempted from Section

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[7/] *See Local Union 1261, District 22 United Mine Workers of America v. Federal Mine Safety and Health Review Comm'n*, 917 F.2d 42, 46 (D.C. Cir. 1990) ("it would be unusual for a statute [that was determined to be ] free from ambiguity to be subject to different interpretations by the Commission over time, or, more immediately, by a closely divided panel in the decision under review"). Thus, the Commission cannot support its determination that the same provision, which it claims is unambiguous, can be read differently depending upon the result sought to be achieved.

[8/] *See supra* note 2.

[9/] According to the *Order*, the Commission resorts to legislative history not because it believes that Section 254(g) is ambiguous, but because it is responding to those petitioners who have made that assertion. *Order* at ¶ 11.

254(g)."[10] This determination, however, ignores Congress's *express* intention to codify in Section 254(g) the Commission's *existing* rate integration policies for landline interexchange carriers in place *prior* to the passage of the 1996 Act, and stands traditional principles of legislative history interpretation on their head. Indeed, as the Conference Report states: "New [S]ection 254(g) is intended to incorporate the policies of geographic rate averaging and rate integration of interexchange services. . . ."[11]

The Commission's existing rate integration policy prior to the codification of the 1996 Act did not cover CMRS providers. Thus, it is puzzling that the Commission would expect to find plain, unambiguous language in the legislative history that excludes CMRS providers when CMRS providers were never included under the Commission's past rate integration policies. On the contrary, what is unambiguous is that Congress viewed this provision as codifying only the existing geographic rate averaging and rate integration of long distance landline rates, and not a directive to the Commission to require rate averaging for the "interstate, interexchange" portion of CMRS service. Congress, by its own words, did not expand the scope of the Commission's rate integration policy in any way. Any interpretation to the contrary, therefore, is erroneous as a matter of law and must be reconsidered.

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[10] *Id.*

[11] H.R. CONF. REP. No. 104-458, at 132 (1996) (emphasis added). The Senate bill is even more direct: "Subsection (g) . . . simply incorporates in the Communications Act the existing practice of geographic rate averaging and rate integration for interexchange, or long distance, telecommunications rates . . . ." *Id.* at 129. The Commission plainly understood this to be the case. *See, e.g., First Memorandum Opinion and Order*, 12 FCC Rcd. at 11819, ¶ 14. ("an interpretation of section 254(g) that requires rate integration across affiliates is consistent with Congressional intent that section 254(g) codify the Commission's *past* policies.") (emphasis added).

Furthermore, the underlying purpose of Section 254(g), *i.e.*, to ensure that residents of off-shore areas are not faced with higher interexchange rates than residents of the contiguous United States, also shows that Section 254(g)'s rate integration requirements were not intended to apply to CMRS providers. Telephone subscribers in Hawaii, Alaska and Puerto Rico, for example, are protected by Section 254(g) from the interexchange rate discrimination Congress feared might occur in the absence of a rate integration requirement.

It is instructive that in the case of non-contiguous U.S. states and territories, CMRS providers cannot and do not build their wireless networks to provide the interexchange connection between these areas. Rather, CMRS carriers typically resell landline interexchange carrier service to complete mobile-originated calls to offshore domestic points. Because CMRS carriers take this rate integrated service from interexchange carriers, their underlying cost is already established. CMRS providers have no reason to modify these rates.[12/] Applying rate integration to CMRS, therefore, does not advance Congress' goal in enacting Section 254(g), and the Commission should reconsider its decision to extend the scope of Section 254(g) to the CMRS industry.

## II. CMRS RATE INTEGRATION REQUIREMENTS WILL FRUSTRATE THE COMMISSION'S DEREGULATORY POLICY IN FAVOR OF CMRS RATE COMPETITION

Any interstate, interexchange CMRS rate integration requirement will negatively impact CMRS consumers and is inconsistent with the Commission's extremely successful policies in favor of CMRS service and price competition. As a consequence of the competitive conditions in the

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[12/] Even assuming the Commission discovered an unreasonable discrimination problem with wireless providers, the Commission could respond on a much narrower basis to address the specific issue, rather than uniformly prescribing rate integration for CMRS providers in the absence of any legal requirement that CMRS rates be integrated or any evidence that unreasonable discrimination exists.

CMRS industry and the Commission's de-regulatory approach to CMRS rates and service offerings, wireless long distance has begun to disappear as a concept. By using flat-rate, distance-insensitive pricing and "one-rate" plans in which long distance and roaming charges are virtually if not entirely eliminated, CMRS carriers are pushing the envelope and blurring distinctions between local and toll calling. There is no question these developments offer consumers with new and significant service choices that do not fit within traditional categories. The Commission has recognized this in acknowledging that "one-rate" CMRS calling plans cannot easily fit within Section 254(g).[13/]

As the Commission currently interprets the CMRS obligation, CMRS carriers can avoid the rate integration requirement by eliminating a separately stated interexchange charge. Consequently, the Commission's rules may have the perverse effect of harming consumers living in rural, insular and offshore areas by providing an incentive for CMRS carriers to eliminate separately stated long distance charges and to raise "local" rates to subsidize integrated long distance rates.

The Commission has established a policy in favor of CMRS competition and innovation that has produced a "steady downward trend" in rates.[14/] Nextel and other CMRS providers have responded to increasing facilities-based competition by introducing innovative pricing options and varying service plans tailored to the needs of customers. An interexchange rate integration requirement frustrates CMRS innovation and promotes calling plans designed to avoid government

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[13/] Rather than recognizing the ill-fit between CMRS and Section 254(g), the Commission promises a further notice to explore how to apply Section 254(g) to CMRS "one-rate" plans. *Order* at ¶ 25.

[14/] *See* Powell Statement at 8.

regulation rather than responding to competitive conditions in the CMRS marketplace. Because the Commission is not required by any law or policy to impose a rate integration requirement on CMRS, the application of rate integration to CMRS carriers should be reconsidered.

## III. THE DECISION TO ADOPT MAJOR TRADING AREAS AS THE DEFINITIONAL BOUNDARY FOR CMRS RATE INTEGRATION IS UNWORKABLE

In the *Order*, the Commission concluded that CMRS traffic originating and terminating within a single MTA is not "interexchange" traffic and therefore it is not subject to Section 254(g).[15/] All other interstate, inter-MTA traffic is subject to Section 254(g) rate averaging and integration requirements.

The problem with an MTA-specific approach to defining the CMRS rate integration obligation is that it fails to acknowledge unique licensing and operational realities of various subsets of CMRS carriers. In adopting MTAs as a surrogate for landline exchange areas, the Commission correctly acknowledged that CMRS providers' "local" service areas are different from those of landline carriers. However, the Commission appears to have assumed that adoption of the MTA as the relevant "interexchange" boundary would have no impact on current carrier operations. CMRS carriers, however, do not operate with common network designs or in common licensing environments. The Commission's *Order* does not acknowledge the impact rate integration or rate

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15/ *Order* at ¶ 23. The Commission grounded this decision on the dual basis that cellular, broadband PCS, and covered SMR providers provide "comparable service" to telephone exchange service over a much broader territory than landline exchanges and because use of MTAs is consistent with the Commission's conclusion in the *Local Competition Order* that MTAs defined the area in which reciprocal compensation obligations apply to LEC-CMRS interconnection. *Id.*

averaging requirements could have on CMRS operations and CMRS competition.[16/] Accordingly, on reconsideration, the Commission must acknowledge the real variations between CMRS providers' serving areas and specifically, the problems cellular and ESMR carriers face when complying with an MTA boundary structure.

Unlike the licenses assigned to other broadband wireless providers, *i.e.* cellular and PCS, which are granted on a wide-area geographic basis (MSA, BTA or MTA), SMR licenses historically were granted on a site-by-site basis, requiring Nextel to obtain thousands of licenses to construct and operate its ESMR systems. Only recently has the Commission begun the auction and licensing of wide-area ESMR licenses.[17/] As a consequence of site licensing and ESMR Economic Area licensing, Nextel's network does not uniformly treat calling between MTAs as interexchange. If MTA-based regulation is affirmed on reconsideration, it would arbitrarily and unreasonably restrict Nextel's ability to establish efficient routing among its switches and local calling areas responsive to marketplace conditions and competition. The resulting artificial network configuration would increase costs and disadvantage subscribers — a result wholly at odds with the Commission's CMRS goals.

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[16/] Use of only MTA boundaries, for example, would seem to directly advantage A and B Block PCS carriers who were licensed on this basis and C, D, E and F Block PCS providers licensed on a BTA basis who would not have to rate integrate within an MTA regardless of the actual scope of their system within the MTA.

[17/] Notably, however, the Commission has not chosen the MTA as the appropriate license area, but instead is using an Economic Area ("EA") as the licensed area.

Reliance upon MTAs as a "compliance zone" for CMRS rate integration is not a panacea.[18/] At the very least, on reconsideration, the Commission must consider allowing CMRS providers the flexibility to adopt their own local calling areas for purposes of any required rate integration and rate averaging.

## IV. CONCLUSION

For all these reasons, Nextel respectfully requests that the Commission act in accordance with this Petition for Reconsideration.

Respectfully Submitted,

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18/ Nextel has alerted the Commission that MTAs cannot blindly be used as the basis for all CMRS regulatory compliance. For example, in the Commission's proceeding addressing the universal service contributions of CMRS carriers, Nextel objected to the required use of MTAs to determine levels of universal service obligations. *See* Federal State Joint Board on Universal Service, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45; FCC 98-278 (rel. October 26, 1998); Comments of Nextel Communications at 8 (filed January 11, 1999); Reply Comments of Nextel Communications at 6 (filed January 25, 1999).

## CERTIFICATE OF SERVICE

I, Jeanette M. Corley, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 4h day of March, 1999, I caused copies of the foregoing "**Petition for Reconsideration of Nextel Communications, Inc.**" to be served upon the parties listed below via hand delivery or first class mail:

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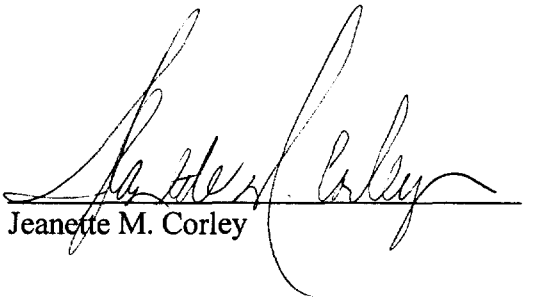

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